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7 THE UNITED STATES DISTRICT COURT

8 IN AND FOR THE DISTRICT OF ARIZONA

9 SCOTTSDALE CAPITAL ADVISORS
10 CORPORATION, an Arizona
11 Corporation,

Case No.: CV04 1045PHXRCB

12 Plaintiff/Counterdefendant,

13 v.

14 RENEGADE PROMOTIONS, LLC, a
15 Colorado limited liability company,

16 Defendant/Counterclaimant.

17 MOTION TO ENFORCE
18 SETTLEMENT AGREEMENT;
19 ALTERNATIVELY MOTION FOR
20 SUMMARY JUDGMENT AS TO
21 SETTLEMENT AGREEMENT

(Oral Argument Requested)

22 Defendant, Renegade Promotions, LLC, pursuant to Rule 56, *Fed.*

23 *R.Civ.Pro.*, hereby moves for summary judgment as to the Settlement

24 Agreement of the parties for the reason that there is no genuine issue of material

25 fact and Renegade is entitled to judgment as a matter of law. This Motion is

26 based upon the record and file herein, the attached Memorandum of Points and

27 Authorities, and the accompanying Statement of Facts and the Exhibits thereto.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. FACTS**

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4 The facts are set forth in a separate statement as required by Rule
5 1.10(l)(1), *Rules of Practice*, U.S. District Court for the District of Arizona. For
6 the convenience of the Court, they are briefly summarized here.

7
8 Plaintiff initiated this lawsuit in Maricopa County Superior Court for
9 breach of contract in April 2004. After removal from Maricopa County Superior
10 Court to this Court, Defendant filed its Answer and Counterclaim on May 27,
11 2004. In December, 2004, the parties agreed to settle this case at a mediation
12 conducted by Lawrence Fleischman. At that time, Renegade stipulated to a
13 judgment in the amount of \$150,000 in favor of SCA. Notwithstanding the
14 stipulated judgment, the parties agreed on December 6, 2004 that judgment
15 would not be entered provided that Renegade paid SCA \$25,000 on February 1,
16 2005, \$35,000 on August 1, 2005 and \$45,000 on October 1, 2005. The parties
17 further agreed that in the event that Renegade paid \$50,000 on July 1, 2005, the
18 October 1, 2005 payment would not have to be made. In essence, the parties
19 agreed that if Renegade paid SCA \$75,000 by July 1, 2005, the claim was
20 settled.

21
22 The parties later entered into a separate, more formal Settlement
23 Agreement that recited the above payment terms, with the exception, that

1 through inadvertence or mistake, the \$35,000 payment that was to be made on
2 August 1, 2005 was listed as being due on July 1, 2005.
3

4 Renegade made the first payment of \$25,000 before February 1, 2005. It
5 intended to pay the additional \$50,000 in sufficient time so that the total amount
6 payable under the Agreement would be limited to \$75,000 pursuant to paragraph
7 1(d) of the Settlement Agreement. Given the discrepancies in the payment
8 schedules between the two Settlement Agreements, Renegade made an error.
9 Renegade believed that the \$50,000 payment was due on August 1, 2005.
10 Consequently, Renegade made a payment of \$50,000 to SCA on August 1,
11 2005. Renegade, however, clearly indicated on the face of the certified check
12 that was received by SCA on August 1, 2005 that it had "PAID IN FULL".
13

14 SCA negotiated the check without protest. Three weeks later, however,
15 SCA informed Renegade for the first time that SCA intended to apply the
16 \$50,000 payment to the \$35,000 payment it claimed was due on either July 1, or
17 August 1 (depending upon which of the two settlement agreements was applied)
18 and apply the remaining \$15,000 of the \$45,000 to the payment that it claimed
19 was due on October 1, 2005. Renegade took the position that it had paid in full.
20

21 The parties attempted to resolve this dispute, but they were unable to do
22 so. On September 27, 2005, SCA's counsel wrote to Renegade's counsel
23 informing Renegade that unless it paid an additional \$30,000 by October 1,
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1 2005, SCA would have the stipulated judgment entered and it would begin
2 collection efforts. Pursuant to the Settlement Agreement of the parties, if the
3 Court had entered such a judgment, Renegade would have owed an additional
4 \$80,000 rather than the \$30,000 that SCA claimed was still owing pursuant to
5 Paragraph 1(d) of the Settlement Agreement. In order to prevent this great
6 forfeiture, Renegade paid SCA \$30,000 under protest on September 30, 2005
7 and it has now filed this Motion for enforcement of the Settlement Agreement
8 and for return of the \$30,000 that it paid under protest.

12 As discussed in detail below, SCA has been paid in full. By accepting
13 payment of the check marked as "PAID IN FULL" on August 1, 2005, SCA
14 either waived its right to timely payment and accepted the payment as tendered
15 and/or it is bound by the doctrine of accord and satisfaction. In either case, it
16 must return the \$30,000.
17

19 **II. DISCUSSION**
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21 **A. Acceptance of the \$50,000 check marked as "PAID IN FULL"**
22 **constituted waiver of the late payment.**

23 As set forth above, in the Settlement Agreement, the parties agreed that if
24 Renegade paid at total of \$75,000 by July 1, 2005, this would be considered full
25 payment. Renegade paid \$75,000, but the final \$50,000 was not paid by July 1,
26 2005, but rather it was paid by August 1, 2005. Although SCA accepted and
27 negotiated the check clearly marked as "PAID IN FULL", it now claims that it
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1 should not be responsible for the consequences of its intentional actions. The
2 law is to the contrary.
3

4 Where, as here, a party to a settlement agreement accepts a late payment,
5 it waives the right to declare a breach of the agreement. *Associated Builders,*
6 *Inc. v. Coggins*, 722 A.2d 1278 (Me. 1999). In *Coggins*, as here, the defendant
7 entered into an agreement to pay a debt to the plaintiff in two installments. In
8 *Coggins*, the first installment of \$25,000 was due on July 1, 1996 and the
9 second installment of \$25,000 was due on July 1, 1997. The agreement
10 stipulated that if payments were not made as required by the agreement, an
11 additional \$20,000 would be payable. The *Coggins* defendant made the first
12 payment on time, but it made the second payment three days late. The plaintiff
13 claimed a breach of contract and sued for the balance. The Maine Supreme
14 Court upheld summary judgment for the defendant on the grounds that there was
15 an accord and satisfaction and because the Plaintiff had waived its right to
16 timely payment. Application of these same principles to the present case
17 requires entry of judgment in favor of Renegade.
18

19 The *Coggins* court noted that the settlement agreement in that case
20 constituted an accord and that performance of the accord constituted
21 satisfaction. The question before the *Coggins* court was whether the defendant's
22 late payment constituted a material breach of the accord. In analyzing the issue,
23

1 the *Coggins* court applied the five factors set forth in *Restatement (Second) of*
2 *Contracts* § 241 to determine that the breach was not material. The same
3 analysis yields the same result here.

5 The analysis is as follows: (a) The extent to which the injured party will
6 be deprived of the benefit which he reasonably expected. Here, SCA expected
7 to receive \$50,000 on July 1, 2005. SCA actually received \$50,000 on August
8 1, 2005. Considering the Federal interest rate on judgments, SCA was deprived
9 of less than \$400 by accepting the late payment, less than one percent of the
10 amount in dispute; (b) The extent to which the injured party can be adequately
11 compensated for the part of the benefit of which he was deprived. In this case,
12 Renegade stands ready to pay SCA any lost interest; (c) The extent to which the
13 party failing to perform will suffer forfeiture. If the Court refuses to grant
14 Renegade's Motion, Renegade will suffer a loss of \$30,000; (d) The likelihood
15 that the party failing to perform will cure his failure. Renegade has already cured
16 any claimed failure. It has paid the money. It has not only paid the money, it has
17 paid an additional \$30,000 under protest; (e) The extent to which the behavior of
18 the party failing to perform comports with the standards of good faith and fair
19 dealing. Renegade has paid everything it owed and more. Obviously, its actions
20 comported with the standards of good faith and fair dealing.
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1 Therefore, applying the *Restatement* factors to the present case, it is clear
2 that any breach of the accord and satisfaction embodied in the December
3 Settlement Agreement was immaterial. Since the breach was immaterial, the
4 satisfaction has been performed. Therefore, like the defendant in *Coggins*,
5 Renegade is entitled to summary judgment. It is also entitled to the return of its
6 \$30,000 paid under protest.

7 Furthermore, even if the breach had been material and SCA could have
8 enforced the forfeiture, SCA waived that right when it accepted late payment.
9 Waiver is the intentional relinquishment of a known right. *Northern Arizona*
10 *Gas Service, Inc. v. Petrolane Transport, Inc.*, 145 Ariz. 467, 476, 702 P.2d 696,
11 705 (App. 1984). Waiver may be express or inferred from conduct. *Id.* A party
12 may waive a contractual right arising from a breach of late payment when that
13 party accepts tender of the late payment. *Associated Builders, Inc. v. Coggins*,
14 *supra*, at 1281. Here, SCA accepted a payment of \$50,000 that plainly stated it
15 was "PAID IN FULL". The \$50,000 payment could only be attributable to the
16 amount due as full and final payment by July 1, 2005. Having accepted the
17 payment on August 1, 2005 with that express condition, SCA intentionally
18 agreed to waive a claim that Renegade had breached the accord and satisfaction
19 by late payment. Accordingly, Renegade is entitled to judgment.

20 **B. Renegade is also entitled to judgment because acceptance of the**
21 **\$50,000 check constituted a new accord and satisfaction.**

1
2 In *Flagel v. Southwest Clinical Psychiatrists, P.C.*, 157 Ariz. 196, 755 P.2d
3 1184 (App. 1988), the elements of accord and satisfaction are set forth as
4 follows: (1) proper subject matter; (2) competent parties; (3) assent or meeting
5 of the minds of the parties; and (4) consideration. Each of the elements exists
6 here. There was a proper subject matter, the parties were competent, there was
7 an assent or meeting of the minds in that SCA accepted the check knowing that
8 the debt was to be considered as "paid in full" and there was consideration.
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11 Renegade understands that SCA will argue that the fourth element of an
12 accord and satisfaction was not present here. SCA's position is that as of August
13 1, 2005, there was a liquidated amount owing. Because that amount was
14 undisputed, there was no consideration for its acceptance of a lesser amount as
15 payment in full. According to SCA, the amount owing as of August 1, 2005 was
16 the \$35,000 due that date along with the \$45,000 due on October 1, 2005.
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19 The flaw in SCA's reasoning is that it incorrectly assumes that there was
20 no dispute as to whether its acceptance of late payment constituted a waiver of
21 the right to timely payment. Because the law, as discussed in Section II(A)
22 above, provides that acceptance of late payment either may not be a material
23 breach of a contract or it may be considered a waiver of late payment on August
24 1, 2005, there was, at a minimum, a *bona fide* dispute as to whether the amount
25 paid on that date was the total amount owing. Therefore, the amount owing was
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1 in dispute. Accordingly, pursuant to *Flagel v. Southwest Clinical Physiatrists*
2 and A.R.S. § 47-3311, payment of the \$50,000 was a proper accord and
3 satisfaction.

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5 In addition, analytically, the reason that there must be a *bona fide* dispute
6 for an accord and satisfaction to be binding is that there must be legal
7 consideration for any agreement to accept less than the amount originally owing.
8
9 See *Flagel v. Southwest Clinical Physiatrists*, 157 Ariz. at 202. Here, there is a
10 separate basis for finding consideration. Even if the August 1 payment of
11 \$50,000 is considered to be late, even if the Court determines that the late
12 payment was not waived, even if the Court finds this late payment to be a
13 material breach, it is incontrovertible that a portion of that \$50,000 was
14 prepayment of at least \$15,000 of the settlement amount.
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17 The Settlement Agreement provided that payments were to be made
18 \$25,000 on February 1, \$35,000 on August 1 and \$45,000 on October 1.
19 Because Plaintiff paid \$25,000 on February 1, 2005 and \$50,000 on August 1,
20 2005, it prepaid by \$15,000 any amounts that were owing by October 1, 2005.
21 Under these circumstances, there was valid consideration for the accord and
22 satisfaction.
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25 Prepayment is valid consideration for an agreement to accept less than the
26 full amount of the debt. *First Hartford Realty Corp. v. Ellis*, 434 A.2d 314, 319
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(Conn. 1980) (and See authorities cited therein); *Melroy v. Kemmerer*, 67 A. 699 (Pa. 1907); 1 Am. Jur. 2d *Accord and Satisfaction* § 36 Anno.; "Payment before Maturity of Part of a Liquidated and Undisputed Indebtedness as Consideration for its Acceptance as Satisfaction of the Entire Debt", 24 A.L.R. 1474; and *McCreary County v. Bybee*, 193 S.W.2d 423 (Ky. App. 1946).

The common law doctrine that prepayment of indebtedness is consideration for an accord and satisfaction is not affected by the adoption of A.R.S. § 47-3311. A.R.S. § 47-3311 was not intended to alter the common law rules regarding accord and satisfaction except in certain very limited circumstances that do not apply here. *See Uniform Commercial Code Comment* 3 which states in pertinent part as follows: "Section 3-311 follows the common law rule with some minor variations to reflect modern business conditions . . . Section 3-311 is based upon a belief that the common law rules produces a fair result and that informal dispute resolution by full satisfaction check should be encouraged".

Therefore, in addition to the other bases for granting summary judgment to Renegade, Renegade's prepayment of a portion of its debt constitutes a separate and sufficient basis for a finding that SCA is bound by the accord and satisfaction it entered into by intentionally accepted the \$50,000 denoted as "PAID IN FULL".

III. CONCLUSION

A motion to enforce settlement agreement is an appropriate mechanism for resolving this dispute. *Hays v. Fischer*, 161 Ariz. 159, 777 P.2d 222 (1989). For the reasons set forth above, Renegade fully complied with the terms of the Settlement Agreement when it paid and SCA accepted a check in the amount of \$50,000 marked as "PAID IN FULL". Accordingly, Renegade is entitled to summary judgment requiring SCA to return to Renegade the \$30,000 paid under protest on September 30, 2005. In addition, pursuant to paragraph 11(m) of the second Settlement Agreement, Renegade is entitled to its reasonable attorney's fees incurred in enforcing the Settlement Agreement.

RESPECTFULLY SUBMITTED this 5th day of October, 2005.

HAMMOND & TOBLER, P.C.

By: /s/ Doug Tobler - #006196
Doug Tobler, Attorney for
Defendant/Counterclaimant

1 Original of the foregoing filed electronically
2 this 5th day of October, 2005, with:

3 CLERK OF THE UNITED STATES DISTRICT COURT
4 DISTRICT OF ARIZONA
5 SANDRA DAY O'CONNOR U.S. COURTHOUSE
6 401 W. WASHINGTON STREET, SUITE 130, SPC 1
7 PHOENIX, AZ 85003-2118

8 One copy the foregoing hand-delivered
9 this 5th day of October, 2005, to:

10 HONORABLE ROBERT C. BROOMFIELD
11 SANDRA DAY O'CONNOR U.S. COURTHOUSE
12 401 W. WASHINGTON STREET, SUITE 130, SPC 1
13 PHOENIX, AZ 85003-2118

14 One copy of the foregoing mailed
15 this 5th day of October, 2005, to:

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/s/ Donna A. Belowsky